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No. _____

In The Supreme Court of the United States

CHRISTOPHER T. LIZZI,

Petitioner,

v.

WMATA, ROBERT ALEXANDER, CHARLES THOMAS, PHILLIP WALLACE, AL McCOY, ANTHONY JOHNSON DENISE KURTZ (as personal representative of the estate of Michael Kurtz), and JACK BYRD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE CONGRESSIONALLY – APPROVED INTERSTATE COMPACT CREATING THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ("WMATA"), BY STATING THAT WMATA MAY "SUE AND BE SUED" AND THAT UNITED STATES DISTRICT COURTS HAVE JURISDICTION OVER SUITS BROUGHT AGAINST WMATA, WAIVE ELEVENTH AMENDMENT IMMUNITY?

II. DOES THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (THE "FMLA") ABROGATE ELEVENTH AMENDMENT IMMUNITY?

III. DOES THE ELEVENTH AMENDMENT SHIELD STATE OFFICERS FROM LIABILITY IN THEIR INDIVIDUAL CAPACITY FOR FMLA VIOLATIONS?

IV. IF A COMPLAINT DOES NOT SPECIFY THE CAPACITY – INDIVIDUAL OR OFFICIAL - IN WHICH A STATE EMPLOYEE IS BEING SUED, SHOULD A COURT REVIEW THE "COURSE OF PROCEEDINGS" TO RESOLVE ANY CONFUSION?

LIST OF PARTIES

The Petitioner is Christopher T. Lizzi.

The Respondents are WMATA, Robert Alexander, Charles Thomas, Phillip Wallace, Al McCoy, Anthony Johnson, Dennise Kurtz (as personal representative of the estate of Michael Kurtz), and Jack Byrd.

The United States of America intervened in the proceedings in the District Court, but did not participate in the Fourth Circuit proceedings. 28 U.S.C. § 2403(a) may apply. The Fourth Circuit did not, pursuant to 28 U.S.C. § 2403(a), certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. The notifications required by Rule 29.4(b) have been served.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher T. Lizzi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 20, 2001 in order to review the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Lizzi v. Alexander, et al., 255 F.3d 128, 201 U.S. App. LEXIS 13759 (4th Cir. 6/20/01), is set forth in the Appendix hereto. App. 3a-17a.

The Memorandum Opinion of the United States District Court for the District of Maryland (Southern Division) in Lizzi v. WMATA, et al. is unreported and is set forth in the Appendix hereto. App. 20a-32a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit affirming in part, and reversing in part, the decision of the United States District Court for the District of Maryland (Southern Division) was entered on June 20, 2001. App. 3a-17a. On July 17, 2001, the Court of Appeals denied the petition for rehearing and rehearing en banc. App. 1a-2a. This petition for a writ of certiorari is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Compact Clause of Article I, Section 10

> No State shall, without the Consent of Congress, enter into any Agreement or Compact with another State....

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Sections 1 and 5

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WMATA Compact, Section 12(a)
Md. Cts. & Jud. Proc. Code Ann. § 10204(12(a))

In addition to the powers and duties elsewhere described in this title, and except as limited in this title, the Authority may:
(a) sue and be sued....

WMATA Compact, Section 80
Md. Cts. & Jud. Proc. Code Ann. § 10204(80)

The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the zone of any immunity from suit.

WMATA Compact, Section 81
Md. Cts. & Jud. Proc. Code Ann. § 10204(81)

> The United States District Courts shall have original jurisdiction, concurrent with the courts of Maryland, Virginia and the District of Columbia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State or District of Columbia court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

STATEMENT OF THE CASE

Petitioner Lizzi brought this FMLA action against respondents, WMATA and various WMATA supervisors, invoking 28 U.S.C. § 1331 as a basis for federal jurisdiction.

WMATA was created pursuant to the Compact Clause of the Constitution by a Congressionally-approved interstate compact among Maryland, Virginia, and the District of Columbia (the "Compact").

Section 12 of the Compact states that WMATA may "sue and be sued." Section 81 states that the United States District Courts shall have original jurisdiction of suits brought against WMATA.

Lizzi's complaint does not expressly state whether the supervisors were sued in their individual or official capacity. But during the "course of proceedings" following the compaint, the parties and the District Court expressly referred to the supervisors as individual-capacity defendants.

The District Court held that the Eleventh Amendment shields WMATA from Lizzi's FMLA claims. Specifically, after determining that Maryland and Virginia intended to confer Eleventh Amendment immunity on WMATA, the District Court held that §§ 12 and 81 of the Compact - the sue-and-be-sued and federal-court-venue clauses - do not waive Eleventh Amendment immunity and that the FMLA does not abrogate such immunity. App. 24a-30a. For these reasons, it granted WMATA summary judgment.

But the District Court denied the supervisors' summary judgment motion. It ruled that they can be held personally liable for FMLA violations and that the Compact confers no immunity on them. App. 30a-32a.

On interlocutory appeal, the Fourth Circuit affirmed in part and reversed in part. App. 3a-17a.

It affirmed the District Court's conclusions that §§ 12 and 81 of the Compact do not effect a waiver of Eleventh Amendment immunity and that the FMLA does not abrogate that immunity. App. 8a-11a.

On the former issue, the Fourth Circuit rejected Lizzi's argument that §§ 12 and 81 of the Compact waive Eleventh Amendment immunity under this Court's holdings in Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), and Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 279 (1959), where this Court held that a consent to suit-clause, read together with federal-court-venue clause, waives an interstate-compact entity's Eleventh Amendment immunity. App. 9a-11a.

The Fourth Circuit found that another Compact provision - § 80 - renders Feeney and Petty inapplicable. App. 10a-11a. Section 80 states in relevant part:

> [WMATA] shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. Md. Cts. & Jud. Proc. Code Ann. § 10-204(80).

While Lizzi vigorously protested that since § 80 refers only to claims arising under the "law of the applicable signatory," it applies only to state law claims – and not his FMLA claim, the Fourth Circuit disagreed, stating that § 80 delineates the entire extent to which WMATA's immunity is waived. App. 11a. It relied principally on the District of Columbia Circuit's holding in Morris v. WMATA, 781 F.2d 218, 222 n.3 (D.C. 1986), App. 10a-11a, even though Morris predated Feeney and didn't consider Petty.

Having rejected Lizzi's waiver arguments, the Fourth Circuit addressed abrogation. App. 11a-14a. It stated that the abrogation "issue is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation - employment discrimination on the basis of sex." App. 12a. It stated that "Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." App. 13a.

Moreover, it concluded that "the FMLA is simply not tailored to redress the asserted Fourteenth Amendment harm of gender discrimination," reasoning "that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel practices without any finding that the states were culpable of an Equal Protection violation to begin with." App. 13a. In the Court of Appeals' words, "[i]nstead of attempting to remedy the identified violation, Congress attempted to "redefine the right" by creating a substantive entitlement to leave. App. 13a.

While it thus affirmed the District Court's conclusions concerning WMATA, the Fourth Circuit reversed that Court's holding regarding the supervisors. It held, first, that Lizzi has sued the supervisors in only their official capacity. App. 15a. In support, it stated that the complaint does not specify the capacity in which the supervisors were sued and then inferred from various aspects of the complaint that the supervisors are official-capacity defendants only. App. 15a. The Court of Appeals did not consider the "course of proceedings," in which the parties and the District Court treated the supervisors as individual capacity defendants. App. 15a.

Next, the Court of Appeals held that, even if the complaint had specified that the supervisors were being sued in their individual capacity, Lizzi couldn't sue them in that capacity. App. 15a-17a. It reasoned that the real party in interest in FMLA lawsuits against state officials is the state itself and determined that this Court's holding in Hafer v. Melo, 502 U.S. 21 (1991), which permits individual-capacity claims against state officials under 42 U.S.C. § 1983, is inapposite. App. 16a-17a.

REASONS FOR GRANTING THE WRIT

I. By Holding That The WMATA Interstate Compact, Which Says That WMATA May "Sue And Be Sued" And That United States District Courts Shall Have Jurisdiction Over Suits Against WMATA, Does Not Waive Eleventh Amendment Immunity, The Fourth Circuit Contradicted This Court's Holdings, In Port Authority Trans-Hudson Corp. v. Feeney And Petty v. Tennessee-Missouri Bridge Comm., That Such Consent-To-Suit And Federal-Court-Venue Provisions Waive The Eleventh Amendment Immunity Of Interstate-Compact Entities.

Sections 12 and 81 of WMATA's Compact state, respectively, that WMATA may "sue and be sued" and that the "United States District Courts shall have original jurisdiction ... of all suits brought by or against WMATA." Under this Court's precedent, these provisions waive Eleventh Amendment immunity.

In Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), this Court held that a "consent to suit" provision governing an interstate compact, read together with a federal-court-venue clause, waived such immunity. Likewise, in Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275 (1959), it held that an interstate compact's sue-and-be-sued clause, together with a federal-court-venue provision, effected such a waiver.

Lizzi asserted below that, under Feeney and Petty, §§ 12 and 81 waive Eleventh Amendment immunity. But the Fourth Circuit disagreed - by wrongly interpreting § 80 of the Compact. Section 80 says in relevant part:

> [WMATA] shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent[s] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which [WMATA] shall be liable, as herein provided, shall be by suit against [WMATA].

The Fourth Circuit concluded that § 80 "delineates the entire scope of WMATA's consent to be sued," and that therefore it would be inappropriate to construe §§ 12 and 81 as a waiver of Eleventh Amendment immunity. App. at 11a. It relied principally upon Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986). App. 10a-11a. For numerous reasons, both the Fourth Circuit and Morris were wrong.

First, § 80's language signals that it applies only to state-law claims. It says that WMATA "shall be liable for contracts and torts in accordance with the law of the applicable signatory." Since the only signatories to the WMATA Compact are Maryland, Virginia, and the District of Columbia, this phrase can't be interpreted as a reference to federal-law claims. The Fourth Circuit offers no

explanation for its contrary conclusion. Moreover, § 80's language is strikingly similar to – and in fact analogous to - the provision in the Federal Tort Claims Act (the "FTCA") which allows the United States to be sued for torts "in accordance with the law of the place where the act or omission occurred," a provision which unquestionably addresses only state-law claims. Indeed, the District of Columbia Circuit has based its interpretation of § 80 on the case law construing this FTCA provision. Sanders v. WMATA, 819 F.3d 1151, 1155 (D.C. Cir. 1987).

Second, in the two cases which Morris cites for its suggestion - in a footnote - that the Compact effects no waiver of Eleventh Amendment immunity - Florida Dept. of Health and Rehabilitative Serv. v. Florida Nursing Home, 450 U.S. 147 (1981), and Trotman v. Palisades Interstate Park Comm., 557 F.2d 35 (2d Cir. 1977), no federal-court-venue clauses accompanied the suability clauses that were present.

Third, Morris did not address the impact of § 81 on the immunity issue. It predated Feeney and didn't consider Petty. Yet Feeney and Petty provide controlling guidance.

Fourth, the relationship between §§ 12 and 80 is analogous to the relationship between the sue-and-be-sued clauses in the legislative schemes creating federal agencies and the provisions of the FTCA which govern state law tort claims against those agencies. In that relationship, the sue-and-be-sued clause effects a broad waiver of immunity from claims, while the FTCA applies state-law principles to state-law-tort claims brought against those agencies. This relationship is described in FDIC v. Meyer, 510 U.S. 471 (1994), and Global Mail Serv. Ltd. v. United States Postal

Serv., 142 F.3d 208, 210-11 (4th Cir. 1998). Once this relationship is understood, the peaceful coexistence of §§ 12, 80, and 81 becomes clear. And that harmony enables §§ 12 and 81 to effect the waiver described in Feeney and Petty, while §80 applies traditional state-law principles to traditional state-law claims.

Fifth, the Fourth Circuit wrongly ignores - indeed nullifies - the meaning of the sue-and-be-sued clause in § 12 of the Compact. Federal law governs the interpretation of § 12, since the WMATA Compact - and all interstate compacts - are federal law. Cuyler v. Adams, 449 U.S. 443, 440 (1981)("Where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject matter for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause of the Constitution."); Beebe v. WMATA, 129 F.3d 1283, 1288 (D.C. 1997)(same); Trotman v. Palisades Interstate Park Comm., 557 F.2d 35, 39 (2d Cir. 1977)(stating that "the meaning of sue-and-be-sued clauses in an interstate compact turns on federal rather than state law"). And this Court has clarified that, under federal law, sue-and-be-sued clauses are a broad waiver of immunity. FDIC v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988)("Congress ... has waived the sovereign immunity of certain federal entities from the times of their inception by including in the enabling legislation provisions that they may sue and be sued."); Federal Housing Admin. v. Burr, 309 U.S. 242, 245 (1940). Disregarding this precedent, the Fourth Circuit accords the sue-and-be-sued clause in § 12 no weight at all. Instead, it strains § 80's words and meaning. But as previously explained, § 80 by its terms has nothing to do with federal-law claims.

Sixth, in College Savings Bk. v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 U.S. 666 (1999), this Court, while holding that sovereign immunity shielded a state from a federal trademark claim, expressly recognized that cases – (such as Petty) - involving interstate-compact agencies present a "fundamentally different" immunity analysis, since states cannot form such agencies without Congress' approval - an approval that is a "gratuity" which Congress can withhold in the absence of a waiver of Eleventh Amendment immunity. The Fourth Circuit failed to apply that "fundamentally different" analysis.

II. The Fourth Circuit's Holding That The FMLA Doesn't Abrogate Eleventh Amendment Immunity Conflicts With This Court's Federalism Decisions.

Like the Fourth Circuit, various other Circuits have held that the FMLA, or certain of its provisions, do not abrogate Eleventh Amendment immunity. Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001); Townsel v. State of Missouri, 233 F.3d 1094 (2d Cir. 2000); Chittister v. Department of Comm. & Econ. Dev., 226 F.3d 223 (3rd Cir. 2000); Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000); Sims v. University of Cincinnati, 219 F.3d 559 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000); Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 121 S.Ct. 968 (2001).

But dissenting opinions in the First, Fifth, and Eleventh Circuits have persuasively argued that those Courts have misapplied this Court's recent federalism decisions. Laro, 259 F.3d at 41-65; Kazmier, 225 F.3d at 533-49;

Garrett, 193 F.3d at 1227-35. And a district court in the First Circuit has held that the FMLA's conferral of family – as opposed to personal - leave abrogates Eleventh Amendment immunity. Serafin v. Connecticut Dept. of Mental Health & Addiction Serv., 118 F. Supp.2d 274, 275-78 (D. Conn. 2000).

The need for this Court's review of this issue becomes clear upon scrutiny of the Fourth Circuit's reasons for holding that the FMLA doesn't nullify the States' Eleventh Amendment immunity – reasons which echo its sister circuits' rationales.

In addressing abrogation, the Fourth Circuit stated that "the issue ... is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation – employment discrimination on the basis of sex." App. 12a. It then offered its reasoning for saying "no" to this question. App. 12a-14a.

First, it stated that while the FMLA identifies gender discrimination as the constitutional harm to be remedied, "Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." App. 13a.

As an initial matter, however, it is highly questionable whether Congress was required to recite extensive state-sponsored gender discrimination before passing the FMLA to combat it. The Kazmier dissent demonstrated that "when Congress is exercising its concurrent power and duty to enforce the Equal Protection Clause of the Fourteenth Amendment on behalf of a group

which has been identified as a suspect or quasi-suspect class by the Supreme Court, [it] is not required to prove past or potential government discrimination against that class before proceeding to enact rational means of remedying, preventing or deterring the risk of future violations of the constitutional rights of members of that suspect class." 225 F.3d at 543. Of course, each gender is a quasi-suspect class under this Court's precedent.

Also, even if Congress was required to find sex discrimination by the States before enacting the FMLA, it did so. As the Garrett dissent observed, Congress found, during the legislative inquiry preceding passage of the FMLA, that both men and women suffered discrimination with respect to leave time. Id. at 1228-29. "Particularly relevant in this Eleventh Amendment context," the dissent noted, "is that Congress found that public sector employees were suffering comparable sex discrimination problems with regard to leave time as employees in the private sector." Id. at 1230 & n. 13. Likewise, the Kazmier dissent stated that "[t]estimony in hearings throughout the legislative process demonstrated that such discrepancies occurred in both the public and private sectors." 225 F.3d at 548. That testimony, which is cited in the Kazmier dissent, 225 F.3d at 548, is substantial.

After wrongly ascribing to Congress a fatal failure to identify gender discrimination by the States, the Fourth Circuit went on to determine that "the FMLA is simply not narrowly tailored to redress the asserted Fourteenth Amendment harm of gender discrimination." App. 13a. According to the Court of Appeals, the "difficulty is that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel

practices without any finding that the states were culpable to begin with," and thus is an attempt by Congress to "redefine the right" rather than remedy an Equal Protection Clause violation. App. 13a. The Garrett dissent refuted this reasoning, stating as follows:

> Congress determined that a mere negative imperative upon employers, in the form of a law prohibiting them from discriminating in the granting of employee leave time on the basis of sex, was insufficient because it had already proven inadequate under Title VII, which already mandated that employers who granted parental leave had to do so equally between the sexes, *see* 42 U.S.C. § 2000e-2(a), and persisted despite protections such as the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-2(k), and 42 U.S.C. § 1983. Moreover, the Title VII experience also taught Congress that a mere prohibition was impracticable because it placed too great of an enforcement burden upon employees: the costs of legal challenges to asserted violations were prohibitive, and for those who did not have this problem the time spent litigating negated any eventual positive result. 193 F.3d at 1231 (footnotes omitted).

Also, the Fourth Circuit's disparaging reference to the FMLA's "substantive entitlement" overlooks this Court's recognition that "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and deter violation of rights guaranteed thereunder

by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000). Similarly, it disregards the principle, recognized by the Kazmier dissent, that a law enacted pursuant to § 5 of the Fourteenth Amendment is valid "if a court can ascertain that the measure is a rational means adopted to deter or prevent discrimination against suspect classes." 225 F.3d at 543.

Moreover, the Fourth Circuit, in striking down the FMLA as it applies to the States, failed to address certain aspects of the FMLA that ensure its congruence with the problem that it seeks to remedy and deter. As the Garrett dissent states, the FMLA contains only "limited measures." 193 F.3d at 1233. It applies only to firms employing fifty or more employees (which comprise approximately five percent (5%) of businesses); protects only employees who have worked for a covered employer for at least one year, during which they have worked at least 1250 hours; guarantees only unpaid leave; requires covered employees to give thirty days advanced notice of foreseeable leave requests, and in that instance mandates a reasonable effort not to unduly disrupt the employer's operations; and allows employers to require the certification of serious medical conditions. Id. at 1232-33. Significantly, as the Kazmier dissent also noted, Congress demonstrated a concerted effort to minimize the burden that the FMLA imposes on state employers by excluding from its coverage state employees holding high-ranking or sensitive positions. Id. at 1233 & n. 28.

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), also calls the Fourth Circuit's analysis into question, by distinguishing the age discrimination at issue there from the

gender discrimination targeted by the FMLA. It states that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" Id. at 83 (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)). It also states that "[o]lder persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" Id. (quoting Massachusetts Bd. Of Retirement v. Murgia, 427 U.S. 307, 313 (1976)). This Court has thus indicated that, in contrast to older persons, persons who suffer gender discrimination have been subjected to a history of purposeful unequal treatment. That history obviated any need for Congress to support the FMLA's enactment with detailed evidence of gender discrimination by the States.

There is another reason for review of the abrogation issue presented by the FMLA. Several of the Circuits on which the Fourth Circuit relied have, without authority, analyzed the abrogation issue presented by the FMLA in piecemeal fashion, holding only that certain FMLA provisions do not abrogate Eleventh Amendment immunity. See Laro v. New Hampshire, 259 F.3d 1, 2 (1st Cir. 2001)(holding only the FMLA's personal-medical-leave provisions do not abrogate such immunity); Chittister v. Department of Comm. & Econ. Dev., 226 F.3d at 229 (holding that the FMLA's personal-medical-leave provisions do not abrogate such immunity); Kazmier, 225 F.3d at 522 (stating that "we conclude that the particular provisions of the FMLA that are at issue in the instant case do not validly abrogate" such immunity); Hale, 219, 221-22 (holding that the FMLA's personal-medical-leave provisions do not

abrogate such immunity, but noting that "we pass only on the particular provisions at issue here"); Garrett, 193 F.3d at 1216 (holding that "although it might well not be immune from suit under certain other provisions of the" FMLA, the States are "immune from suit under the specific provisions at issue here").

This approach to the abrogation analysis is suspect. As the Kazmier dissent states:

> [I] emphatically disagree with the majority's piecemeal, fragmented approach to a determination of whether the statute is a congruent, proportional and rational means to prevent and deter governmental and private gender based discrimination. The FMLA is a comprehensive, reticulated statute that prohibits and requires a synergism of constitutional employment practices as a rational means of deterring the difficult and intractable evils of governmental and private gender based discrimination in employment. Although a principal goal of the FMLA is to deter sex discrimination against male and female employees in granting leave time, the statute also addresses a complex of inextricably related issues and side effects, such as gender discrimination based on sexual stereotypes, counterbalancing of perceived inequities and incentives to discriminate, and the ramifications of the legislation for children and families. As the majority concedes, it has no authority to support its

> atomistic interpretative methodology by which it parses the statute into subsections, examines each in isolation, and requires that each be based on its own separate evidentiary predicate. Proceeding as the proverbial blind men examining an elephant's parts, my colleagues fail to discover the true nature of the creature as a whole. [T]he remedies implemented by the FMLA are not distinct, but rather were found interdependently necessary as a whole to effectuate Congress' stated purpose to deter and prevent unconstitutional discrimination. 225 F.3d at 544.

III. The Fourth Circuit's Holding That The Eleventh Amendment Shields State Officers From FMLA Liability Not Only Conflicts With A Tenth Circuit Holding That Imposes Individual-Capacity Liability On Government Officials For FMLA Violations And The Holdings Of Various Circuits That The Eleventh Amendment Does Not Immunize State Officers From Individual-Capacity Liability, But Also Contradicts This Court's Holding In Hafer v. Melo.

The Fourth Circuit held that government officials enjoy Eleventh Amendment immunity from suits brought against them in their individual capacity for FMLA violations. App. 14a-17a. In Wascura v. Carver, 169 F.3d 683, 686 (11th Cir. 1999), the Eleventh Circuit, in a much-criticized decision, reached the same conclusion. And in

Kazmier, supra, the Fifth Circuit so held in conclusory fashion. 225 F.3d at 533 n. 65.

In direct conflict with those Circuits, the Tenth Circuit recently held, in Cornforth v. University of Okla. Bd. of Regents, 263 F.3d 1129, 2001 U.S. App. LEXIS 18512 (10th Cir. 2001), that state officers may be held personally liable for FMLA violations. The Tenth Circuit squarely rejected the Fourth Circuit's reasoning. First, it determined that this Court's holding in Hafer does control, stating as follows:

> As a general rule, suits seeking damages from state officials in their individual capacities are not barred by the Eleventh Amendment. See Hafer [v. Melo], 502 U.S. at 21, 30-31; Papasan v. Allain, 478 U.S. 265, 277 n. 11 (1986). "[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." Alden v. Maine, 527 U.S. 706, 757 (1999). The Eleventh Amendment is not implicated in such suits because any award of damages will be satisfied from the individual's personal assets and will not be paid from the state treasury. 2001 U.S. App. LEXIS 18512 at *8.

Also, the Cornforth court rejected the Fourth Circuit's suggestion that the state is the real party in interest

in individual-capacity suits brought against its officers. It said:

> Barringer [, the defendant state officer,] ... contends that an award of damages to Cornforth would effectively compel the [state] University to comply with FMLA. Thus, he argues, the University is the real party in interest and the Eleventh Amendment bars federal courts from hearing Cornforth's FMLA claims against him for damages.... Presumably, Barringer believes that an award of damages against him will prompt the University to comply with FMLA either to protect its employees from personal liability or to avoid any obligation it may have to indemnify its employees.
>
> Barringer's argument, however, is based purely on conjecture and he has failed to demonstrate or even argue that a judgment against him individually for damages would legally *require* the University to comply with FMLA. The University may choose to comply with FMLA for any number of reasons, and Barringer has not demonstrated that a decision by the University to comply with FMLA in the wake of a damage award against him is any less a voluntary act than a state's choice to indemnify its employees. The compliance and any attendant costs would, in no way, be forced upon the

> University by the outcome of the federal suit, but would constitute a purely voluntary choice on the part of the University. 2000 U.S. App. LEXIS 18512, at *9-11.

In further conflict with the holdings of the Fourth and Eleventh Circuits in this case and Wascura, the Seventh Circuit, in Luder v. Endicott, 253 F.3d 1020 (7th Cir. 2001)(Posner, J.), recently held as follows in a case brought against state officers under the Fair Labor Standards Act (the "FLSA"), the statutory scheme on which the FMLA is largely based:

> The application of the Eleventh Amendment to suits against state officials in their individual capacity depends on the circumstances. The general rule is that such suits are not barred by the amendment, because the plaintiff is seeking damages from individuals rather than from the state treasury....
>
> .... But even when a suit is against a public officer in his or her individual capacity, the court is obliged to consider whether it may really and substantially be against the state. Id. at 1022-23.

In so holding, the Seventh Circuit rejected the Eleventh Circuit's holding in Wascura, stating that "the [reasoning] on which the Eleventh Circuit relied had been swept away by the Supreme Court in Hafer." Id. at 1022.

The Fourth Circuit's holding in this case conflicts with not only the holdings of the Tenth and Seventh Circuits in Cornforth and Luder, but also the holdings of various Circuits (including the Fourth in a prior case), district courts, and at least one state appellate court that state officials can be held liable in their individual capacity. Bankston v. Illinois, 60 F.3d 1249, 1257 (7th Cir. 1995) (affirming without comment an FLSA damage award against a state official in his individual capacity); Lee v. Coahoma Co., 937 F.2d 220, 226 (5th Cir. 1991), mandate reissued as amended, 37 F.3d 1068 (1991)(holding that a county sheriff "clearly falls within the class of managerial personnel considered employers by the FLSA"); Richard Anderson Photography v. Brown, 852 F.2d 114, 122 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)(holding that a state officer can be held personally liable in federal court for violating the Copyright Act, and stating that "[t]he mere fact that her conduct was undertaken in the course of her state employment does not of course relieve her of individual liability, even if her employer could not be sued for it"); Hartman v. Regents of Univ. of Colo., 22 P.2d 524, 2000 Colo. App. LEXIS 1177, at *16-19 (Colo. Ct. App. 2000), cert. granted sub nom., Middleton v. Hartman, 2001 Colo. LEXIS 336 (2001); Mosley v. Douglas Co. Correctional Ctr., 2000 U.S. Dist. LEXIS 6810, at *7-8 (D. Neb. 2000).

Aside from exacerbating this conflict, the Fourth Circuit's holding contradicts this Court's holding in Hafer. The Fourth Circuit suggests that Hafer is inapposite, stating that Hafer was based on § 1983 and that "unlike § 1983, the FMLA is not focused against those who carry the badge of authority of a State." App. 16a. But, remarkably, it cites no authority for this statement. And the FMLA's definition of

employer - which express encompasses public entities and their agents - disproves it.

In trying to distance Hafer, the Fourth Circuit also says that "[w]hereas § 1983 is intended as a broad enforcement vehicle to bring suit against state officials for violations of all other federal statutory and constitutional rights, the FMLA is focused on creating a set of statutory entitlements in its own right." App. 16a. It fails, however, to explain how any such distinction compels the conclusion that state officials are personally immune from federal-court lawsuits alleging FMLA - as opposed to § 1983 - violations. It also cites no authorities supporting that notion, which Cornforth rejects.

The Fourth Circuit further states that "the text of the FMLA does not contain the well-established system of immunities which § 1983 defendants can assert." App. 16a. Yet it provides no explanation of how the absence in the FMLA text of specific reference to immunities endows state officials with Eleventh Amendment immunity. Indeed, even the text of § 1983 doesn't specifically mention any immunities.

Next, the Fourth Circuit states that "[t]o hold that individual supervisors, as 'employers,' may be sued under the statute, while also holding that the Constitution prohibits the state itself from being sued would undermine the Supreme Court's decisions in Garrett, Kimel and Seminole Tribe." App. 16a-17a. Such a holding would, in the Court of Appeals' words, "create ... an anomaly" under which '[t]he state would still suffer the indignity of having each decision regarding personnel or organization matters subject to second-guessing by a federal court.'" App. 17a. Yet neither

Garrett, Kimel, nor Seminole Tribe addresses personal-capacity immunity, and this Court reached those decisions only after holding in Hafer that government officials are not personally immune from § 1983 actions. Moreover, the Fourth Circuit's attempt to distinguish FMLA claims from § 1983 actions flies in the face of this Court's statement in Alden v. Maine, 527 U.S. 706 (1999),, that "[e]ven a suit from money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury, but from the officer personally." Id. at 757. The Alden Court so stated in considering not a § 1983 claim, but a claim brought under the FLSA.

In sum, the Fourth Circuit's decision merits review because it conflicts with decisions of other Circuits and contradicts this Court's precedent.

IV. In Hafer v. Melo, This Court Recognized, But Did Not Resolve, An Inter-Circuit Conflict Concerning The Proper Method For Determining, In Instances Where The Complaint Does Not Specify, Whether State Officers Have Been Sued In Their Individual Or Official Capacity. The Fourth Circuit, By Reviewing Only The Complaint - Rather Than The "Course Of Proceedings" - To Determine Whether Government Officials Were Sued In Their Individual Or Official Capacity, Adopted An Approach That, While Consistent With The Method Employed By The Sixth And Eighth Circuits, Conflicts With The "Course-Of-

Proceedings" Approach Used By Not Only The Second, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, And District of Columbia Circuits, But Also The Fourth Circuit Itself In Prior Cases.

Ten years ago, in Hafer v. Melo, 502 U.S. 21 (1991), this Court noted the existence of an inter-circuit conflict concerning the proper method for determining the capacity in which government officials have been sued if the complaint does not specify. Id. at 24 (asterisked note). It noted that certain circuits look to the "proceedings below" to make this determination, while others "impose a more rigid pleading requirement." Id.

This conflict persists, and is presented by this case. Lizzi's complaint names various state officers as defendants, but does not expressly state whether they were sued in the their official or individual capacity. But the "course of proceedings" clarifies that Lizzi was suing them in their individual capacity. In his memorandum opposing summary judgment, Lizzi stated: "In addition to WMATA, plaintiff has sued various individuals ... in their individual capacities." Likewise, the state officers themselves acted as individual-capacity defendants throughout, stating at the summary judgment stage that they "are entitled to Eleventh Amendment immunity on individual capacity claims as well." And, in its memorandum opinion, the District Court stated: "Plaintiff also brings his FMLA claim against six individual employees of WMATA in their individual capacities." App. 30a.

The Fourth Circuit nonetheless noted that the complaint doesn't expressly state the capacity in which the

government officials were sued and proceeded to review only the complaint to (purportedly) divine the capacity in which they were sued. App. 15a-16a. It completely ignored the "course of proceedings" following the complaint.

Like the Fourth Circuit in this case, the Sixth and Eighth Circuits' have held that a complaint which doesn't specifically state that a government official is being sued in his individual capacity will be interpreted as an official-capacity action only - without any examination of the ensuing "course of proceedings." Artis v. Francis Howell North Band Booster Ass'n, 161 F.3d 1178, 1182 (8th Cir. 1998)("If the complaint does not specifically name the defendant in his individual capacity, it is presumed he is sued only in his official capacity."); Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989)(holding that a plaintiff seeking damages from a government official in his individual capacity must specify this in his complaint). A district court in the First Circuit has also adopted this approach. Charron v. Picano, 811 F. Supp. 768, 772 (D. R.I. 1993)("Although the question is one of first impression in the First Circuit, it appears to this Court that the 'bright line' rule adopted by the Sixth and Eighth Circuits is preferable....").

By contrast, the majority of circuits - including the Fourth Circuit before this case - have held that when a complaint is silent as to whether a government official has been sued in his official or individual capacity, the court should review the "course of proceedings" to resolve the issue. Frank v. Relin, 1 F.3d 1317, 1326 (2d Cir. 1993), cert. denied, 510 U.S. 1012 (1993)("[W]hen the face of a complaint fails to state clearly whether a government official is being sued in his official capacity, or his individual capacity, or both, courts look to the 'course of proceedings' to

determine" this."); Melo v. Gurley, 912 F.2d 628, 635-36 (3rd Cir. 1990), aff'd, 502 U.S. 21 (1991); Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995); Parker v. Graves, 479 F.2d 335, 336 (5th Cir. 1973); Conner v. Reinhard, 847 F.2d 384, 394 n. 8 (7th Cir. 1988), cert. denied, 488 U.S. 856 (1988); Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990), cert. denied, 502 U.S. 967 (1991); Pride v. Various John Does, 997 F.2d 712, 715 (10th Cir. 1993)("[W]here the complaint fails to specify the capacity in which the government official is sued, we look to the substance of the pleadings and the course of proceedings...."); Jackson v. Georgia Dept. of Transp., 16 F.3d 1573, 1575 (11th Cir. 1994)("When it is not clear in which capacity the defendants are sued, the course of proceedings typically indicates the nature of the liability sought to be imposed."); Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996).

This inter-circuit confusion has lasted long enough and should be resolved. Review by this Court will provide long-awaited clarity in this oft-litigated area of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should summarily reverse the holdings of the Fourth Circuit addressed herein.

Respectfully Submitted,
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: July 17, 2001

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ,
Defendants-Appellants, } No. 00-2103

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

CHRISTOPHER T. LIZZI,
Plaintiff-Appellant,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ; WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD,
Defendants-Appellees, } No. 00-2104

and

MICHAEL KURTZ,
Defendant.

UNITED STATES OF AMERICA,
Movant.

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ,
Defendants-Appellants, } No. 00-2126

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner
CLERK

PUBLISHED

UNITED STATES COURT OF APPEALS
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CHRISTOPHER T. LIZZI,
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UNITED STATES OF AMERICA,
Movant.

No. 00-2103

CHRISTOPHER T. LIZZI,
Plaintiff-Appellant,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ; WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD,
Defendants-Appellees,

and

MICHAEL KURTZ,
Defendant.

UNITED STATES OF AMERICA,
Movant.

No. 00-2104

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ,
Defendants-Appellants,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

No. 00-2126

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Deborah K. Chasanow, District Judge.
(CA-98-2660-DKC)

Argued: April 4, 2001

Decided: June 20, 2001

Before WILKINSON, Chief Judge, and LUTTIG and GREGORY, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Gregory joined.

COUNSEL

ARGUED: Gerard J. Stief, Associate General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellants. Paul Francis Evelius, WRIGHT, CONSTABLE & SKEEN, L.L.P., Baltimore, Maryland, for Appellee. **ON BRIEF:** Cheryl C. Burke, General Counsel, Robert J. Kniaz, Deputy General Counsel, Sonia A. Bacchus, Assistant General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellants.

OPINION

WILKINSON, Chief Judge:

In this case, we must decide whether the Eleventh Amendment shields the Washington Metropolitan Area Transit Authority (WMATA), an agency created by interstate compact, from plaintiff Christopher Lizzi's assertions that the agency violated the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. (1994). We also must decide the related question of whether sovereign immunity bars Lizzi's allegation that several individual employees of WMATA violated the FMLA and are thus subject to personal liability for the alleged damages. The district court held that the Eleventh Amendment bars Lizzi's claims against WMATA, but that the FMLA permits Lizzi to bring an action against the employees of WMATA in their individual capacities. Because sovereign immunity extends to WMATA, and because the claims against the WMATA employees are in reality claims against the agency itself, we affirm in part, reverse in part, and remand with directions to dismiss the action.

I.

A.

Plaintiff Christopher Lizzi worked as a bus wheelchair lift mechanic for WMATA until September, 1997. WMATA fired Lizzi for allegedly combining sick days and vacation leave to miss work for

the entire summer. WMATA maintained that Lizzi fabricated his sick leave and did not submit to a medical exam, as required by the agency's policies. Lizzi contested this, and filed suit under the FMLA alleging that WMATA terminated him in violation of the Act.

Lizzi sued WMATA as well as seven individual supervisors at WMATA. The complaint stated that "Plaintiff Christopher T. Lizzi sues defendants Washington Metropolitan Area Transit Authority, Robert Alexander, Charles Thomas, Anthony Johnson, Michael Kurtz, Phillip Wallace, Al McCoy, and Jack Byrd." The complaint further declared that the individual defendants "have, at all relevant times, been employees of WMATA." The complaint also noted the supervisory positions of some of these defendants. McCoy and Byrd were Garage Shift Supervisors; Johnson oversaw the Garage Shift Supervisors; Alexander was WMATA's Absenteeism Supervisor; and Kurtz was WMATA's Bus Maintenance Superintendent. The complaint did not specify the positions of either Thomas or Wallace. Lizzi asked for, *inter alia*, reinstatement, back pay, damages, and an order prohibiting the defendants from violating the FMLA.

The district court granted summary judgment for WMATA on Eleventh Amendment grounds, but kept the individual defendants in the case. The lower court held that the WMATA compact does not waive the agency's Eleventh Amendment immunity, and that the FMLA is not a valid exercise of Congress' Fourteenth Amendment, § 5 power. But the court also held that the FMLA specifically defines "employer" to include supervisors, and thus the plain language of the FMLA authorizes suits against the individual employees in their individual capacities. The district court certified for interlocutory appeal the issues of WMATA's waiver of immunity and the liability of the individual defendants under the FMLA. WMATA appeals the decision to keep the individual supervisors in the case, and Lizzi cross-appeals the district court's decision that the compact does not waive WMATA's sovereign immunity.

B.

WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia. Its purpose is to ensure the proper functioning and operation of a mass transit system

in the Washington, D.C. metropolitan area. *See Morris v. WMATA*, 781 F.2d 218, 219 (D.C. Cir. 1986). WMATA receives approximately 44% of its budget from the signatory states. The WMATA compact was approved by Congress in 1966. *See* Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966).

Three sections of the compact are at the heart of this case. First, § 12 states that WMATA may "[s]ue and be sued." *Id.* at 1328. Second, § 80 declares that WMATA

> shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent [sic] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia, and the counties and cities within the zone of any immunity from suit.

Id. at 1350. Third, § 81 says in pertinent part:

> The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] and to enforce subpoenas issued under [this compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court.

Id.

II.

A.

We note at the outset that WMATA possesses Eleventh Amendment immunity. The signatories of the compact intended to confer

Eleventh Amendment immunity on WMATA. *See Delon Hampton & Assoc. v. WMATA*, 943 F.2d 355, 359 (4th Cir. 1991). Further, both this circuit and the D.C. Circuit have held that Eleventh Amendment immunity may attach to WMATA's actions. *See id.* at 359; *Morris*, 781 F.2d at 220. WMATA is a state agency, subject to all the benefits and liabilities of a state itself, including sovereign immunity. *See Morris*, 781 F.2d at 219-20. It does not matter that WMATA was created by interstate compact, as opposed to being an agency of one state alone. *See Delon Hampton*, 943 F.2d at 359; *Jones v. WMATA*, 205 F.3d 428, 432 (D.C. Cir. 2000).

In *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Supreme Court held that the Port Authority Trans-Hudson, an interstate compact entity, could not claim sovereign immunity. *See Hess*, 513 U.S. at 52-53. But the Court in *Hess* relied heavily on the fact that the Port Authority did not receive any funding from any state. Instead, it was a "self-sustaining" agency. *Id.* at 50. Indeed, the Court in *Hess* specifically distinguished the Port Authority from WMATA because WMATA was not self-sufficient. *Id.* at 49-50. Thus, the conferral of Eleventh Amendment immunity on WMATA "is compatible" with the holding in *Hess*. *Id.* at 50 n.20.

B.

Lizzi argues that under *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), §§ 12 and 81 of the WMATA Compact read together effect a waiver of the agency's Eleventh Amendment immunity.

In *Feeney*, the Supreme Court ruled that an interstate compact entity, the Port Authority Trans-Hudson, had given its consent to suit in federal court. *See* 495 U.S. at 308-09. The statutory consent to suit provision in *Feeney* proclaimed that the states gave "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority." *Id.* at 306 (internal quotations omitted) (alteration in original). This provision standing alone, although "broadly framed," may have reflected "only a State's consent to suit in its own courts." *Id.* The Court thus looked at the venue provision of the compact, which stated that venue "shall be laid within a county or judicial district, established by one of said

States or by the United States . . . ." *Id.* at 307 (internal quotations omitted). Since the venue provision explicitly referred to federal courts, the Court held that the statutory consent to suit provision must encompass both federal and state courts. *See id.* at 307-09.

Lizzi argues that the similar provisions in the WMATA compact also effect a waiver of Eleventh Amendment immunity. Section 12 states that WMATA may "[s]ue and be sued." 80 Stat. at 1328. And § 81 makes clear that venue is proper in federal court. Thus, Lizzi maintains that under the reasoning of *Feeney*, WMATA must have waived its Eleventh Amendment immunity.

We disagree. Even were we to assume that WMATA's consent to suit provision is coextensive with the broader consent to suit provision in *Feeney*, Lizzi's argument has one fatal flaw: § 80 of the WMATA compact "specifically and expressly delineates the scope of WMATA's consent to be sued." *Morris*, 781 F.2d at 222 n.3. *Feeney* is not applicable here because it did not confront the situation in this case — a compact containing another clause specifically addressing the extent to which an agency waives its sovereign immunity. *Morris* involved a suit brought by an officer contending that WMATA discriminatorily discharged him. The *Morris* court disallowed the plaintiff's suit, even though the case arose under federal law, because § 80 did not waive WMATA's Eleventh Amendment immunity. *See id.* at 219-21. Since *Morris*, the District of Columbia Circuit has consistently held that the WMATA compact does not waive the agency's Eleventh Amendment immunity. *See, e.g., Jones*, 205 F.3d at 432 (suit brought under the ADEA dismissed due to WMATA's Eleventh Amendment immunity); *Beebe v. WMATA*, 129 F.3d 1283, 1285-86 (D.C. Cir. 1997) (suit alleging, *inter alia*, constructive discharge dismissed due to WMATA's sovereign immunity); *Souders v. WMATA*, 48 F.3d 546, 551 (D.C. Cir. 1995) (nuisance suit dismissed due to WMATA's Eleventh Amendment immunity); *Sanders v. WMATA*, 819 F.2d 1151, 1153-56 (D.C. Cir. 1987) (suit alleging negligent termination and violation of federal statute dismissed due to WMATA's sovereign immunity).

Lizzi argues in response to this multitude of cases that the D.C. Circuit is wrong, and that § 80 is applicable only to claims arising under state law. We agree with the *Morris* line of cases, however.

Any waiver of Eleventh Amendment immunity must be clear and unequivocal. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974). The text of § 80 indicates that the WMATA compact provides only for a limited waiver of sovereign immunity. The compact explicitly waives WMATA's sovereign immunity for breaches of contract and for torts "committed in the conduct of any proprietary function." 80 Stat. at 1350. There is no contention that the exercise of authority at issue in this suit was in any sense a tort or a contract "committed in the conduct of any proprietary function." Rather, hiring, training, and supervision practices are governmental functions. *See Beebe*, 129 F.3d at 1287. This case therefore does not fit within the scope of WMATA's limited waiver of sovereign immunity.

The compact evinces an intent that the agency does not waive its immunity in all *other* cases. It is thus unavailing to argue that §§ 12 and 81 effected a broad waiver of Eleventh Amendment immunity when § 80 makes so clear the limited nature of any such waiver. Reliance solely upon the sue and be sued clause and the venue clause, as Lizzi urges us to do, "would be particularly inappropriate" in this case because "another section of the Compact, § 80," delineates the entire scope of WMATA's waiver of its sovereign immunity. *Morris*, 781 F.2d at 222 n.3. Lizzi cannot use the combination of §§ 12 and 81 to create a waiver that § 80 itself does not provide. Indeed, "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Finally, we agree with the D.C. Circuit that nothing in the WMATA compact purports to waive the agency's Eleventh Amendment immunity in all cases under federal law. *See Jones*, 205 F.3d at 430; *Morris*, 781 F.2d at 221. Our reading of the compact is not only faithful to its language; it also renders circuit law consistent in the two federal circuits most likely to hear cases in which WMATA is a party.

C.

The only remaining reason why WMATA would be subject to suit is if the FMLA validly abrogates the agency's Eleventh Amendment immunity. The district court ruled that the FMLA did not abrogate WMATA's Eleventh Amendment immunity. We agree.

The Supreme Court has enunciated a two-part test for determining whether an act of Congress abrogates a state's Eleventh Amendment

immunity. First, Congress must unequivocally declare an intent to abrogate. Second, Congress must act pursuant to a valid exercise of its power. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996). We assume for purposes of this decision that Congress has declared its unequivocal intent to abrogate. The FMLA states that an action may be maintained "against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. § 2617(a)(2). *Cf. Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-74 (2000) (holding that identical language in the Age Discrimination in Employment Act constitutes an unmistakably clear attempt by Congress to abrogate a state's Eleventh Amendment immunity).

Congress must also have the proper constitutional authority to abrogate, however. Since *Seminole Tribe*, the Court has made clear that Congress cannot abrogate Eleventh Amendment immunity using its Article I powers. *See, e.g., Board of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 962 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *id.* (collecting cases since *Seminole Tribe*); *see also South Carolina State Ports Auth. v. Federal Mar. Comm'n*, 243 F.3d 165, 168 (4th Cir. 2001). Only under its Fourteenth Amendment, § 5 power can Congress validly abrogate a state's immunity from private suit. *See Garrett*, 121 S. Ct. at 962; *South Carolina Ports*, 243 F.3d at 177.

Legislation properly enacted under § 5 must be congruent and proportional to the Fourteenth Amendment injury being remedied. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Kimel*, 528 U.S. at 81; *Garrett*, 121 S. Ct. at 963. The Supreme Court has held that both the Age Discrimination in Employment Act and the Americans With Disabilities Act were not validly enacted under Congress' § 5 power because "the remedy imposed by Congress" was not "congruent and proportional to the targeted violation." *Garrett*, 121 S. Ct. at 967-68 (ADA); *accord Kimel*, 528 U.S. at 82-83 (ADEA).

Thus, the issue here is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation — employment discrimination on the basis of sex. The statute identifies gender discrimination as the constitutional harm to be remedied by the FMLA. The FMLA states that its purpose is to "minimize[ ] the

potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis" and in a manner "consistent with the Equal Protection Clause of the Fourteenth Amendment." 29 U.S.C. § 2601(b)(4); *see also Chittister v. Department of Cmty. and Econ. Dev.*, 226 F.3d 223, 228 (3d Cir. 2000). In making this finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care. *See Garrett*, 121 S. Ct. at 964-65. As the Third Circuit has stated, "Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause." *Chittister*, 226 F.3d at 228-29.

Moreover, the FMLA is simply not narrowly tailored to redress the asserted Fourteenth Amendment harm of gender discrimination. While Congress has broad latitude to act, it does not have the constitutional power to pass such a sweeping statute on the basis of the purported Fourteenth Amendment violation. The difficulty is that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel practices without any finding that the states were culpable of an Equal Protection violation to begin with. That the FMLA sweeps far beyond the redress of gender discrimination is evident in the breadth of the entitlement to subject a state to suit. Instead of attempting to remedy the identified violation, Congress attempted to redefine the right. As the district court noted, the FMLA "exceeds Congress's power under the Fourteenth Amendment by attempting to define specifically what equal protection means rather than merely remedy an existing constitutional violation."

The FMLA "does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave." *Chittister*, 226 F.3d at 229. The Act imposes on the states a federally devised standard entitling employees to "12 workweeks of leave during any 12-month period." 29 U.S.C. § 2612(a)(1). The Act also allows any person to subject a state to private suit for violating the statute. *Id.* § 2617(a)(2). The Fourteenth Amendment does not allow Congress to prescribe a privately enforceable guarantee to all state

employees of at least twelve weeks of leave per year. *See, e.g., Chittister*, 226 F.3d at 228-29; *Garrett v. University of Ala. at Birmingham Bd. of Tr.*, 193 F.3d 1214, 1219 (11th Cir. 1999), *rev'd on other grounds*, 121 S. Ct. at 968.

In sum, the substantive requirements of the FMLA are "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 82 (quoting *City of Boerne*, 521 U.S. at 532). Indeed, every circuit to examine this issue has identified this fundamental lack of proportionality as a main reason why the FMLA is not a valid abrogation of a state's Eleventh Amendment immunity from suit. *See, e.g., Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Chittister*, 226 F.3d at 229 (legislative scheme not "tailored to preventing any [constitutional] harm"); *Kazmier v. Widmann*, 225 F.3d 519, 526 (5th Cir. 2000) ("Broad, prophylactic legislation must be congruent with and proportional to *actual, identified* constitutional violations by the States."); *Sims v. University of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) ("There is no evidence that this conferment of federally protected leave is tailored to remedy sex-based employment discrimination."); *Garrett*, 193 F.3d at 1219. We agree with all of our sister circuits. The FMLA does not validly abrogate a state's Eleventh Amendment immunity from suit.

III.

WMATA and the individual defendants appeal the district court's determination that the FMLA allows suits against individual supervisors in their individual capacities. In support of this result, the district court pointed to the fact that the FMLA's definition of "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I). WMATA argues preliminarily, however, that the individual defendants in essence have been sued for damages in their official capacities rather than their individual capacities.[1]

[1]In view of our resolution of this issue, we do not address the question of whether, in an action against a private employer, an individual supervisor is subject to personal liability for violating the FMLA.

"Only States and state officers acting in their official capacity are immune from suits for damages in federal court." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. ___, No. 99-1848, slip op. at 10 n.10 (May 29, 2001) (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)). The Supreme Court has declared that the "Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Department of Treas. of Ind.*, 323 U.S. 459, 464 (1945)). The Supreme Court has also made clear that a suit for damages against individual officers in their official capacities is treated like a suit against the state itself. *See, e.g., Pennhurst*, 465 U.S. at 101; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Thus, if Lizzi has sued the individual supervisors in their official capacities, the employees would be entitled to the same Eleventh Amendment immunity that WMATA itself retains.

Here, Lizzi's complaint makes clear that the state is the real party in interest. Lizzi's complaint named seven individuals as well as WMATA. The complaint, however, never stated whether the individuals were being sued in their official or individual capacities. Moreover, the allegations in the complaint recounted how WMATA *as an agency* decided to fire Lizzi. Any actions of the individual defendants were tied inextricably to their official duties. For example, the complaint recounted that "WMATA told [Lizzi]" that he was under investigation after "defendant Alexander, WMATA's Absenteeism Supervisor, recommended in writing to defendant Kurtz, WMATA's Bus Maintenance Superintendent, that plaintiff be terminated." The complaint made no showing of any ultra vires action taken by any individual employee. And a conclusory allegation that the "defendants" were motivated by "spite" and "ill will" is not enough, standing alone, to maintain an FMLA action against these supervisors in their individual capacities.

Indeed, even if Lizzi had actually used the phrase "individual capacity," his complaint could not stand. In *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1985), the Supreme Court emphasized that the mere incantation of the term "individual capacity" is not enough to transform an official capacity action into an individual capacity action. *See* 475 U.S. at 543. Here, Lizzi's complaint is

weaker than *Bender*'s because the complaint does not even state that the defendants are being sued in their individual capacities. Rather, the complaint used the defendants' work address as the address of record and spoke of the individual defendants by name only passingly and in relation to the jobs that they performed at WMATA. The other court to examine the individual-capacity question with regard to FMLA suits against state employees had no difficulty in holding that the real party in interest in these lawsuits is the state, not the individual defendants. *See Kazmier*, 225 F.3d at 533 n.65.

Lizzi argues, however, that *Hafer v. Melo*, 502 U.S. 21 (1991), requires that the claims against the individual supervisors should be treated as an individual-capacity suit. In *Hafer*, the Court held that 42 U.S.C. § 1983 permits individual capacity suits against state officers for damages arising from official acts. *See Hafer*, 502 U.S. at 23. We think, however, that *Hafer* is inapposite. *Hafer* was based on "the broad language of § 1983." *Id.* at 28. Unlike § 1983, the FMLA is not focused against those who carry the "badge of authority of a State." *Hafer*, 502 U.S. at 28 (internal quotations omitted). Whereas § 1983 is intended as a broad enforcement vehicle to bring suit against state officials for violations of all other federal statutory and constitutional rights, the FMLA is focused on creating a set of statutory entitlements in its own right. *See, e.g.*, 29 U.S.C. § 2612(a). Moreover, the text of the FMLA does not contain the well established system of immunities which § 1983 defendants can assert.[3]

Other considerations militate against interpreting the FMLA to hold individual state employees personally liable for official acts. To hold that individual supervisors, as "employers," may be sued under the statute while also holding that the Constitution prohibits the state

[3]The issue of whether the FMLA's remedial scheme is so comprehensive that it preempts the use of § 1983 actions is of course not before us. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (Congress may forbid recourse to § 1983 by, *inter alia*, "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."); *Kilvitis v. County of Luzerne*, 52 F. Supp.2d 403, 419 (M.D. Pa. 1999) (The FMLA provides "comprehensive remedial measures that evinces Congress' intent to foreclose the use of a § 1983 action.").

itself from being sued would undermine the Supreme Court's decisions in *Garrett*, *Kimel*, and *Seminole Tribe*. Plaintiffs like Lizzi would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer. We refuse to create such an anomaly. The state would still suffer the indignity of having each discrete decision regarding personnel or organizational matters subject to second-guessing by a federal court. "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." *Coeur d'Alene*, 521 U.S. at 270.

A rule permitting such individual liability would do nothing more than "adhere to an empty formalism and [would] undermine the principle, reaffirmed . . . in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Id.* Because WMATA enjoys Eleventh Amendment immunity for claims brought under the FMLA, the individual supervisors under the FMLA are protected by that same immunity. *See Beebe*, 129 F.3d at 1288-89 (individual supervisors of WMATA have immunity for alleged wrongful termination of employee). WMATA's Eleventh Amendment immunity transfers to the supervisors because the individuals were sued in their official capacities for their official acts.

IV.

The WMATA compact does not waive the agency's Eleventh Amendment immunity from suit. And the FMLA does not validly abrogate a state's Eleventh Amendment immunity. Consequently, Lizzi's claims against WMATA must be dismissed for lack of subject matter jurisdiction. Similarly, Lizzi's claims against the individual supervisors at WMATA must be dismissed as well because these claims were in reality an action against the agency itself. The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state. For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded with directions to dismiss it.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER T. LIZZI	*	CIVIL ACTION NO.:
Plaintiff	*	DKC 98-2660
v.	*	
WMATA, et al.	*	
Defendant	*	

* * * * * * * * *

ORDER

All parties in this employment action have moved for reconsideration of this court's Order of May 12, 2000; which granted in part and denied in part Defendants' motion for summary judgment and denied Plaintiff's motion for partial summary judgment. The court has reviewed the parties' papers and now rules without a hearing. Local Rule 105.6. The court will DENY the motions for reconsideration. The arguments presented in the motions were carefully considered and rejected by this court during its resolution of the summary judgment motions. The most recent motions do not sway the court to alter its original decision.

However, the court recognizes that there is "substantial ground for difference of opinion" on the "controlling questions" of both individual liability under the Family and Medical Leave Act of 1993 ("FMLA") and waiver of immunity under the Washington Metropolitan Area Transit Authority ("WMATA") interstate compact. See 28 U.S.C. § 1292(b). Defendants have moved the court to certify the issue of individual liability for review by the Fourth Circuit, and Plaintiff asks that, if the court grants this

motion, it include the issue of waiver of immunity. An immediate appeal would resolve these complex matters of law, conserve judicial resources, and "materially advance the ultimate termination of the litigation." Id.

Accordingly, IT IS this 20th day of July, 2000, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendants' Motion for Reconsideration BE, and the same hereby IS, DENIED;

2. Plaintiff's Motion for Reconsideration BE, and the same hereby is, DENIED;

3. Plaintiff's Motion for Substitution of Dennise M. Kurtz, personal representative of the estate of Michael Kurtz, for Defendant Michael Kurtz BE, and same hereby IS, GRANTED;

4. This court's orders resolving the issues of WMATA's waiver of immunity and the liability of individual defendants under the FMLA involve controlling questions of law as to which there are substantial grounds for difference of opinion, and, as to each, an immediate appeal pursuant to 28 U.S.C. § 1292(b) may materially advance the ultimate termination of the litigation;

5. This case BE, and the same hereby IS, STAYED pending resolution of the applications for an interlocutory appeal to the Court of Appeals for the Fourth Circuit; and

6. The Clerk is directed to transmit a copy of this Order to counsel for the parties.

/S/

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER T. LIZZI	*	CIVIL ACTION NO.:
Plaintiff	*	DKC 98-2660
v.	*	
WMATA, et al.	*	
Defendant	*	

* * * * * * * * *

Plaintiff Christopher Lizzi brings this employment discrimination action against Defendants Washington Metropolitan Area Transit Authority ("MWATA") and six individual WMATA employees.[1] 'The original complaint contained six counts, but subsequently Plaintiff dismissed all claims except one, which alleged that Defendants violated Plaintiff's rights under the Family and Medical Leave Act of 1993 ("FMLA"). All parties have moved for summary judgment on the remaining FMLA claim. The issues are fully briefed, [2] and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons stated more fully below, the court will GRANT WMATA's motion and DENY the individual defendants' and Plaintiff's motions for summary judgment.

I. Background

[1] On April 12, 2000, a suggestion of death as to Defendant Michael Kurtz was entered on the record. According to Fed. R. Civ. P. 25, Plaintiff has 90 days to order the substitution of a proper party or else the action shall be dismissed as to Defendant Kurtz.

[2] The court granted the motion of the United States to intervene in this case on February 15, 2000, but the United States declined to file a memorandum related to these motions.

WMATA employed Plaintiff as a lift mechanic to repair handicap equipment on WMATA vehicles from June 16, 1981 to September 5, 1997. The events relevant to this litigation occurred during the summer of 1997. According to Plaintiff, on July 31, 1997, he injured his right ankle while on vacation, Plaintiff submitted to his employer a certificate from his physician that he would be unable to work for approximately four weeks, until August 24, 1997. Furthermore, while absent from work due to the ankle injury, Plaintiff allegedly began to experience pain in the gums of his mouth. In order to treat the pain from gum inflammation, Plaintiff's dentist prescribed Percodan. The dentist, who was also Plaintiff's father, filled out another certificate of medical absence, stating that Plaintiff should not work until August 23, 1997 because of the side effects from the Percodan.

Apparently, at this time, Plaintiff's supervisor began to investigate Plaintiff's absences, suspecting that in 1997 and in prior years Plaintiff used a combination of vacation and sick leave to take an extended "summer vacation."[3] Plaintiff's employer next demanded that Plaintiff appear for a medical examination, which he did. The WMATA physician found no reason for Plaintiff to be absent from work and recommended an independent medical examination. Plaintiff did not submit to the independent medical examination as scheduled on August 19, and on September 5, 1997, WMATA terminated Plaintiff for failure to comply with the directions to submit to a medical examination. On September 24, 1997, a WMATA employee, unaware of the termination or the allegations of falsified medical conditions, retroactively designated Plaintiff's absences from August 9 through August 23 as "approved FMLA leave."

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[3] In 1994, Plaintiff was absent from July 4 to September 9; in 1995, from June 16 to September 5; in 1996, from June 24 to September 3; and in 1997 from June 27 until his termination on September 5.

Plaintiff filed this suit on August 7, 1998. Plaintiff alleges that WMATA supervisors failed to provide him with adequate information about his rights under FMLA, and that his termination for failure to appear at an appointment during approved FMLA leave was in violation of that statute.

II. Eleventh Amendment Immunity

Congress created WMATA in 1966 by approving an interstate compact of the States of Maryland and Virginia and the District of Columbia for the purpose of operating commuter trains and buses in the Washington D.C. metropolitan area. Defendant WMATA moves for summary judgment on the claims against it based upon Eleventh Amendment immunity. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite its limited language, in Hans v. Louisiana, 123 U.S. 1 (1890), the Supreme Court held that the Eleventh Amendment forbids a federal court from entertaining a suit by a citizen against any state, even his own. "After reviewing the constitutional debates concerning the scope of Art. III, the Court determined that federal jurisdiction over suits against unconsenting States, 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" Pennhurst State Sch. & Hospl. V. Halderman, 465 U.S. 89, 98 (1984) (citing Hans, 123 U.S. at 15).

A. Is WMATA entitled to Eleventh Amendment immunity?

Although the Supreme Court has not considered any cases involving WMATA specifically, the Court has considered whether an analogous entity, the Port Authority of New York and New Jersey, enjoys Eleventh Amendment immunity. Port Authority operates transportation-related services and was created pursuant to a bistate compact. Furthermore, Congress consented to the compact:

> Bistate entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government.

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994). The Court in Hess stated its general approach to interstate entities: "We would presume the Compact Clause agency does not qualify for Eleventh Amendment immunity '[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose.'" Id. at 43-44. The Court looked to whether the compact types the entity as a state agency; whether the commissioners are state appointees; whether the state exerts control in other manners; the characterization by state courts; and finally and foremost, whether the State bears legal liability for wrongful conduct by the entity's employees. Id. at 44-48. These factors together should guide this court in its immunity analysis.

The D.C. Circuit has consistently held that WMATA enjoys immunity under the Eleventh Amendment form suit in federal court based on its performance of governmental functions. Jones v. WMATA, 205 F.3d 428, 432 (D.C. Cir. 2000); Morris v. WMATA, 781 F.2d 218, 219 (D.C. Cir. 1986). In Morris, the court held that Section 80 of the WMATA Compact clearly demonstrates that Maryland and Virginia intended to confer sovereign immunity upon WMATA. Section 80 provides that WMATA "shall be liable for its contracts and for its torts ...committed in the conduct of any proprietary function, ...but shall not be liable for any torts occurring in the performance of a governmental function." MD. CODE ANN., TRANSP. I § 10-204 (1999 Supp.). The D.C. Circuit held that a reasonable interpretation of this section would be that WMATA enjoys sovereign immunity except in contract or tort actions stemming from the performance of proprietary functions. Id. at 227. Moreover, the Morris court found that other factors supported the conclusion that the States conferred Eleventh Amendment immunity upon WMATA. Other indicia of immunity include the obligation of the States to pay in effect any judgment against WMATA and the degree of control exercised by the States over WMATA through removal powers on the Board.[4] Id. at 227-28. Following the reasoning of Morris this court agrees that WMATA enjoys Eleventh Amendment immunity.[5]

B. Did WMATA waive its Eleventh Amendment immunity?

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[4] Defendants submitted an affidavit of Ms. Antoinette Martin, a manager in the cost allocation offices of WMATA, stating that the financial analysis presented in Morris is still accurate. In fact, according to Ms. Martin, the State of Maryland bears a greater portion of WMATA's financial burden now than in 1986.

[5] In Hess, the Supreme Court cited favorably the D.C. Circuit's decision in Morris. Hess, 513 U.S. at 49-50 & n.20 ("The decision in Morris is compatible with our approach....Thus, we establish no 'per se rule that the Eleventh Amendment never applies when States act in concert.'").

Plaintiff argues that WMATA waived its immunity under the Eleventh Amendment and consented to suit in federal court. In Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), the Court assumed arguendo that a suit against Port Authority possessed. The Court found waiver in two provisions of the compact: the consent to suit provision and the venue provision. The first provided that the States "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise ... against the Port of New York Authority." The second conditioned "[t]he foregoing consent" upon venue that "shall be laid within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District." The Court reasoned:

> Petitioner does not deny that the phrase "judicial district, established ...by the United States" refers to the United States District Courts, but rather argues that the reference to venue cannot shape our construction of the general consent to suit provision. Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the provision directly indicates the extent of the States' waiver embodied in the consent provision. The States passed the venue and consent to suit provisions as portions of the same Acts that set forth the nature, timing, and extent of the States' consent to suit. The venue provision expressly refers to and qualifies the more general consent to suit provision .... The venue

> provision would hardly qualify "[t]he foregoing consent" unless the States intended that consent to include suits in federal court.

Id. At 307-08.

Plaintiff ignores an important distinction between this case and Feeney. In its compact, WMATA has only partially waived its immunity. Although a sovereign's immunity may be waived, Pennhurst, 465 U.S. at 99, that consent must be unequivocally expressed. Edelman v. Jordan, 415 U.S. 651, 673 (1974). Unlike the first provision in Port Authority's compact which provides for consent to suits "of any form or nature at law," Section 80 of the WMATA's Compact only provides for liability "for its contracts and for its torts ... committed in the conduct of any proprietary function." Plaintiff points to Section 81, WMATA's venue provision, which allows original jurisdiction in federal court. However, Sections 80 and 81 must be read as parts of a coherent whole. It is insensible to argue that the states intended to limit waiver of sovereign immunity in Section 80 and subsequently waive all immunity in Section 81. See Wainwright v. WMATA, 958 F. Supp. 6, 8-9 (D.D.C. 97).

Case law also establishes that the actions forming the basis for Plaintiff's suit are not "proprietary functions" encompassed by Section 80's waiver of immunity. The activity at issue here—the supervision and termination of an employee—is a governmental function, and therefore WMATA enjoys sovereign immunity on that claim. A duty is governmental if it is discretionary, involving judgment, planning or policy decisions. Burkhardt v. WMATA, 112 F.3d 1207, 1216 (D.C. Cir. 1997). Hiring, training and supervision practices are clearly established as a governmental function. Id. at 1217. A decision to terminate an individual for abuse of sick leave necessarily involves consideration of numerous factors (budgetary constraints,

experience, public perception, employer intuition) and choice, the key indicium of government function. See Beebe v. WMATA, 129 F.3d 1283, 1287 (D.C. Cir. 1997).

C. Did Congress abrogate WMATA's Eleventh Amendment immunity when it enacted the FMLA?

Although WMATA has not waived its Eleventh Amendment immunity, Congress may in some circumstances abrogate that protection. The determination whether Congress validly abrogated the states' Eleventh Amendment immunity turns on two questions: whether Congress "unequivocally expressed its intent" and whether Congress acted pursuant to a "valid exercise of power." Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998) (holding that Congress did not act pursuant to a valid exercise of power to abrogate in enacting the Fair Labor Standards Act).

Congress must demonstrate its intent to abrogate Eleventh Amendment immunity in an "unmistakably clear" legislative statement. Seminole Tribe v. Florida, 517 U.S. 44, 56 (1994). Congress clearly expressed an intention to abrogate the immunity of state governments when it included state and local governments as covered employers under the FMLA. See 29 U.S.C. § 2611(4)(A)(iii) ("employer" includes any "public agency"); 29 U.S.C. 203(x) ("public agency" includes "any agency of ... a State, or a political subdivision of a State"); see also Knussman v. State of Maryland, 935 F. Supp. 6f59, 662 (D. Md. 1996) (finding Congress unequivocally expressed its desire to abrogate in the FMLA).

However, in order to abrogate the States' sovereign immunity, Congress must also pass the Act at issue "pursuant to a valid exercise of power." Seminole Tribe, 517 U.S. at 58. The Supreme Court has held that only one constitutional provision provides authority to abrogate: Section Five of the Fourteenth Amendment. Id. at 59

(overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality holding that Interstate Commerce Clause also provides authority to abrogate)).

The Fourteenth Amendment provides in relevant part:

> Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws....
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 5 gives Congress the power to secure "perfect equality of civil rights and equal protection of the laws against State denial or invasion." *Ex parte Virginia*, 100 U.S. 339 (1879). However, congressional power is limited to the "power 'to enforce,' not the power to determine what constitutes a constitutional violation." City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding the Religious Freedom Restoration Act of 1993 exceeded Congress' § 5 enforcement powers). In other words, the legislation at issue must be remedial, rather than substantive. Id. "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000).

To determine whether legislation is properly enacted under the Fourteenth Amendment, the court must ask if the statute (1) "may be regarded as an enactment to enforce the Equal Protection Clause"; (2) "is plainly adapted to that end"; and (3) "is not prohibited by but is consistent with the 'letter and spirit of the constitution." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (internal quotations omitted); Abril, 145 F.3d at 187. The first prong is met in this case because Congress declared explicitly that the FMLA intended to promote the family "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

The second prong requires the court to determine whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520. In Kimel, the Court recently found that the ADEA is not a proper exercise of power under the Fourteenth Amendment because "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." Kimel, 120 S. Ct. at 645. Similarly, the FMLA exceeds Congress's power under the Fourteenth Amendment by attempting to define specifically what equal protection means rather than merely remedy an existing constitutional violation. Faced with this issue, other courts have agreed that Congress did not act in this instance within the authority of the Fourteenth Amendment:

> In effect, Congress, inasfar as it purports to rely on the Fourteenth Amendment as the basis of the FMLA, is attempting to dictate that the Equal

> Protection Clause of the Fourteenth Amendment requires that employees be furnished twelve weeks of leave per year for the reasons set forth in the act. This is patently the sort of substantive legislation that exceeds the proper scope of Congress' authority under § 5.

Thomson v. Ohio State Univ. Hosp., 5 F. Supp.2d 574, 579 (S.D. Ohio 1998); see also Garrett v. University of Alabama, 193 F.3d 1214, 1219 (11th Cir. 1999); McGregor v. Goord, 18 F. Supp.2d 204, 208 (N.D.N.Y. 1998) ("In other words, rather than enforcing the Equal Protection Clause, the FMLA attempts to define what equal protection means: twelve weeks of leave for eligible employees for the purposes enumerated in the statute."); Driesse v. Florida Bd. of Regents, 26 F. Supp.2d 1328, 133 (M.D. Fla. 1998) ("thus, the FMLA mandates that not only are employers required to treat leave requests the same for both men and women, but they are required to provide a valuable economic benefit in the form of twelve weeks of leave."); Cohen v. Nebraska, 83 F. Supp.2d 1042, 1045 (D. Neb. 2000); Philbrick v. University of Connecticut, -- F. Supp.2d -, 2000 WL 329813, at *5 (D. Conn. 2000). The FMLA would only be a valid exercise of power under the Fourteenth Amendment if state employment decisions to provide less than twelve weeks of leave are unconstitutional. Therefore, Congress exceeded its power under § 5 and thus failed to abrogate Eleventh Amendment immunity.

III. Individual Liability

Plaintiff also brings his FMLA claim against six individual employees of WMATA in their individual capacities. The FMLA creates liability for "any employer" who interferes with or denies any rights

provided to an employee under the Act. An "employer" under the FMLA includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I); see also 29 C.F.R. § 825.104(d). The plain language of the statute indicates that the FMLA authorizes suits against the individual in their individual capacity. For that reason, the majority of courts—including this one—have held that the FMLA allows individual liability. See, e.g., Donovan v. Agnew, 712 F.2d 1509, 1511 (D. Md. 1996). Therefore, the court will deny their motion for summary judgment.[6]

IV. Plaintiff's Motion for Summary Judgment

Plaintiff moved for summary judgment on his FMLA claim. The court cannot resolve this motion based upon the record at this time. Issues of fact remain to be resolved concerning the validity of Plaintiff's absence during the summer of 1997, the communication between Plaintiff and Defendants, whether his absence qualified as FMLA leave, the role played by each of the individual defendants in the supervision of Plaintiff and their responsibility for the alleged violation. Defendants dispute many facts set forth by Plaintiff in the complaint and his motions, and neither party has adequately addressed the substantive merits of the FMLA claim. In sum, summary judgment is not appropriate at this time.

---

[6] The individual defendants claim that the WMATA compact confers immunity from suit upon its employees, citing Beebe v. WMATA, 129 F.3d 1283 (D.C. Cir. 1997). Beebe does not apply in this case. Beebe held only that WMATA officials enjoy absolute immunity from state-law tort actions where the conduct falls within the scope of employment and occurred in the exercise of governmental functions. This case does not involve a state-law tort claim, but rather an alleged violation of a federal employment statute.

V. Conclusion.

Because WMATA enjoys Eleventh Amendment immunity and has not waived that immunity in this instance and because the FMLA does not validly abrogate the States' sovereign immunity, the court must enter summary judgment in favor of WMATA. However, the individual defendants may be held liable under the FMLA. Accordingly, the court will GRANT WMATA'S motion and DENY the individual defendants' motion for summary judgment.

The court will also DENY plaintiff's motion for partial summary judgment. A separate Order will be entered.

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER T. LIZZI	*	CIVIL ACTION NO.:
Plaintiff	*	DKC 98-2660
v.	*	
WMATA, et al.	*	
Defendant	*	

* * * * * * * * *

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this 12th day of May, 2000, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendants' Motion for Summary Judgment BE, and the same hereby IS, GRANTED as to WMATA and DENIED as to the individual defendants;

2. Plaintiff's Motion for Partial Summary Judgment BE, and the same hereby IS, DENIED;

3. Judgment BE, and hereby IS, ENTERED in favor of Washington Metropolitan Area Transit Authority and against Christopher Lizzi on all claims;

4. A telephone conference is scheduled for May 30, 2000, at 9:00 a.m. to discuss further scheduling. Counsel for Plaintiff is directed to arrange and initiate the call to counsel for Defendants and the court; and

5. The Clerk is directed to transmit a copy of this Order and the accompanying Memorandum Opinion to counsel for the parties.

/S/
DEBORAH K. CHASANOW
United States District Judge

Supreme Court, U.S.
FILED
NOV 16 2001

No. 01-647

IN THE

Supreme Court of the United States

CHRISTOPHER T. LIZZI,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, ROBERT ALEXANDER, CHARLES THOMAS, PHILLIP WALLACE, AL MCCOY, ANTHONY JOHNSON, AND DENISE KURTZ (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL KURTZ),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that the WMATA Compact did not waive WMATA's sovereign immunity from Family and Medical Leave Act ("FMLA") claims under the rationale of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49-50 (1994)?

2. Whether the Court of Appeals, consistent with every other Court of Appeals that has addressed this issue, correctly held that the FMLA did not abrogate WMATA's sovereign immunity?

3. Whether the Court of Appeals correctly found that the individual supervisors were entitled to the protection of WMATA's sovereign immunity because WMATA was the real party in interest?

LISTING OF AFFILIATES PURSUANT TO RULE 29

Pursuant to Rule 29, Respondent Washington Metropolitan Area Transit Authority ("WMATA") is an agency and instrumentality of Maryland, Virginia, and the District of Columbia, created by an interstate compact, as authorized by Congress. *See* Pub. L. No. 89-774. WMATA operates a regional transportation system in the Washington, D.C. metropolitan area. As a governmental entity, WMATA does not have any parent corporation, affiliates, or subsidiaries.

Respondents further note that Plaintiff's Petition incorrectly lists Jack Byrd as a Respondent. Plaintiff voluntarily dismissed Mr. Byrd as a Defendant while the case was pending in the District Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory sections are set forth in the Petition at 2-4. In addition, 29 U.S.C. § 2611 provides, in relevant part:

* * * *

(4) Employer

(A) In general

The term "employer" —

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes —

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

* * * *

STATEMENT OF THE CASE

A. Introduction.

Petitioner Christopher T. Lizzi was employed as a wheelchair lift mechanic by the Washington Metropolitan Area Transit Authority ("WMATA") until his termination on September 5, 1997. Petitioner alleges that his termination for unexcused absences violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* The named Defendants were WMATA and several supervisory-level WMATA employees. By Memorandum Opinion and Order dated May 12, 2000, the District Court granted WMATA's motion for summary judgment because of WMATA's sovereign immunity, but denied the motion as to the individual Defendants. Pet. App. 20a. By Order dated July 20, 2000, the District Court denied both sides' respective motions for reconsideration, but certified the case for an interlocutory appeal. Pet. App. 18a.

The U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's ruling as to WMATA, holding that the

WMATA Compact did not waive WMATA's Eleventh Amendment immunity from this type of suit and Congress did not validly abrogate the states' sovereign immunity from suit by private individuals when it enacted the FMLA. Pet. App. 3a. The Court of Appeals reversed the District Court's holding that the FMLA permits suit against the individual Defendants, finding that these claims were brought against them in their official capacity, and were in reality claims against WMATA itself. The record evidence supporting the Court of Appeals' decision is summarized below.

B. Petitioner's Misuse of Leave and Termination.

At least since 1994 until his termination on September 5, 1997, Petitioner succeeded in stringing together vacation and sick leave in order to be absent from work for continuous periods of time during each summer. In 1994, Plaintiff was absent from July 4 through September 9. Joint Appendix ("J.A.") 48[1]. In 1995, he was absent from June 16 through September 5. *Id.* In 1996, he was absent from June 24 through September 3. *Id.* In 1997, he was absent from June 27 up to the time of his termination on September 5. *Id.* Petitioner had a home near the beach at the New Jersey shore, where he spent a considerable amount of time each summer. J.A. 38.

Petitioner also established a pattern of asking to get off early on Fridays. J.A. 49. If his leave request was not granted, Petitioner would produce dental slips for appointments with his father, a semi-retired dentist, and take sick leave. *Id.* Plaintiff acknowledged in his deposition that the vast majority

1. Citations to the "Joint Appendix" refer to the Joint Appendix submitted to the Court of Appeals.

of his dental records at his father's dental office allegedly memorializing the treatment from his father were in his (Petitioner's) own handwriting. J.A. 42-45.

In the summer of 1997, WMATA commenced an investigation of Petitioner's leave situation. As a result of the investigation, Petitioner was referred to WMATA's medical office for an evaluation. J.A. 48. Petitioner informed the medical office that he would not attend at the scheduled time because he was using the prescription drug Percodan and was in New Jersey. J.A. 58. WMATA rescheduled the appointment. J.A. 48, 58. The examining physician informed Petitioner that she did not find any problem with his ankle or any reason why he could not return to work and referred him to an orthopedic surgeon for an independent medical examination ("IME"), which was scheduled for the next day. J.A. 48, 50, 51. Petitioner then advised the physician that he was on Percodan for gum-related problems; refused to take the card with the orthopedic surgeon's address and number on it; and failed to attend the scheduled IME. J.A. 48, 51.

A meeting was held on September 3, 1997 for Petitioner to present any mitigating circumstances regarding his possible dismissal. J.A. 54. Petitioner claimed at this meeting that he was unaware that the physician had attempted to set up the August 19, 1997 orthopedic IME. *Id.* On September 5, 1997, Petitioner was terminated. J.A. 11. That same day, he applied for FMLA leave. J.A. 17.

C. Proceedings Below.

Petitioner filed the instant action on August 7, 1998. J.A. 9. On May 12, 2000, U.S. District Judge Deborah K. Chasanow granted WMATA's motion for summary judgment

on immunity grounds and denied the individual Defendants' motion. Pet. App. 20a. On July 20, 2000, Judge Chasanow denied both Plaintiff's and the individual Defendants' motions for reconsideration, and certified the case for interlocutory appeal. Pet. App. 18a.

On June 20, 2001, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's finding that WMATA was protected by its sovereign immunity. The Court of Appeals held that the limited waiver of immunity in § 80 of the WMATA Compact for contracts and proprietary function torts in the WMATA Compact did not waive WMATA's immunity in other cases. The Court of Appeals also held that the FMLA did not abrogate WMATA's sovereign immunity. The Court of Appeals reversed the District Court's determination that the FMLA allowed suit against the individual supervisors. The Court of Appeals found that such "claims were in reality an action against the agency itself" and that "[t]he FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state." Pet. App. 17a.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Holding That The WMATA Compact Does Not Provide A Broad Waiver Of WMATA's Sovereign Immunity Is Fully Consistent With This Court's Decision In *Hess*.

On the first issue raised by Petitioner, the issue of the extent of the partial waiver of WMATA's sovereign immunity through the WMATA Compact, Petitioner fails to establish any conflict in the Circuits or other reason which requires

resolution by the Court. Rather, the gravamen of Petitioner's argument is that both Circuits which handle WMATA cases (*i.e.*, the Fourth Circuit below and the District of Columbia Circuit through *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986) and its progeny) are uniformly wrong.

This Court need look no further than its decision in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) as proof that both *Morris* and the decision below relying on *Morris* were correctly decided. In *Hess*, 513 U.S. at 49-50, this Court specifically distinguished the Port Authority situation from that of WMATA, stating:

> And in *Morris v. Washington Metropolitan Area Transit Authority*. 781 F.2d 218 (CADC 1986), Eleventh Amendment immunity was accorded an interstate transit system whose revenue shortfall Congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits. *See id.*, at 225-227. As the *Morris* court concluded: "[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." *Id.*, at 227. [Footnote 20]. There is no such requirement where the agency is structured, as the Port Authority is, to be self-sustaining.

Hess, 513 U.S. at 50 n.20 further notes:

> The decision in *Morris* is compatible with our approach. *See supra*, at 43-44. Thus, we establish

> no "*per se* rule that the Eleventh Amendment never applies when States act in concert." [Citation omitted].

Thus, this Court specifically approved the *Morris* finding that WMATA, a state-level interstate compact governmental entity, possesses Eleventh Amendment/sovereign immunity except as expressly waived. Significantly, *Hess* was decided after the *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) and *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) cases cited by Petitioner. Contrary to Petitioner's argument, *Hess* establishes that *Morris* and the decision below were correctly decided and properly interpret all relevant provisions of the WMATA Compact regarding WMATA's immunity.[2] The Fourth Circuit's decision below on the issue is not only faithful to the language of the WMATA Compact, but also is consistent with *Hess* and the numerous decisions of the District of Columbia Circuit, the only other Circuit likely to hear cases in which WMATA is a party, cited in the Fourth Circuit's decision at Pet. App. 10a.

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2. Justice O'Connor's dissent in *Hess*, 513 U.S. at 60-61, joined in by three other Justices, clearly agrees with the portion of the majority opinion citing *Morris* by stating that "I have no quarrel at all with the many cases cited by the Court for the proposition that *if* an entity's bills will be footed by the State, the Eleventh Amendment clearly precludes the exercise of federal jurisdiction." Thus, *Hess* was unanimous in its reasoning that an entity such as WMATA retains Eleventh Amendment/sovereign immunity.

II. The Fourth Circuit's Holding That The FMLA Does Not Abrogate Eleventh Amendment Immunity Is Fully Consistent With This Court's Recent Decisions On Eleventh Amendment Immunity.

Petitioner's argument on this issue not only fails to establish any conflict among the Circuits, but rather emphasizes that the decision below is fully consistent with all of the Circuits which have addressed the issue of whether the FMLA validly abrogates Eleventh Amendment/sovereign immunity. *See Laro v. New Hampshire*, 259 F.3d 1, 11-13 (1st Cir. 2001); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Chittister v. Department of Cmty. and Econ. Development*, 226 F.3d 223, 228-229 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 526-528 (5th Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559, 564-566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 68-69 (2d Cir. 2000). All of these decisions are fully consistent with the recent decisions of this Court emphasizing that states may not be sued without their consent in either federal or state court unless Congress unequivocally states an intention to abrogate immunity under an appropriate enforcement clause of the Constitution (*i.e.*, § 5 of the Fourteenth Amendment). *See Board of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For legislation to be properly enacted under § 5, the legislative record must reflect a significant pattern of unconstitutional state discrimination violative of the Fourteenth Amendment, and the remedy imposed must be congruent and proportional to the targeted violation. Consequently, as the decision below is fully consistent with the aforementioned decisions of this Court and all of the

Courts of Appeals which have addressed this issue in the context of the FMLA, there is nothing for this Court to resolve by granting review.

III. The Decision Below On The Nonliability Of The Individual Defendants Is Fully Consistent With Prior Decisions Of This Court, Particularly Where WMATA Is The Real Party In Interest.

With respect to the issue of individual Defendant's nonliability under the FMLA, Petitioner acknowledges that the decision below is consistent with the holdings of two other decisions which have addressed this issue. *Kazmier v. Widmann*, 225 F.3d 519, 533 n.65 (5th Cir. 2000); *Wascura v. Carver*, 169 F.3d 683, 688 (11th Cir. 1999). However, Plaintiff relies primarily upon the Tenth Circuit's decision in *Cornforth v. University of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001) in support of his argument. Contrary to the assertion at page 20 of the Petition that "[t]he Tenth Circuit squarely rejected the Fourth Circuit's reasoning," the decision in *Cornforth*, rendered approximately two months after the Fourth Circuit's decision in the instant case, did not even refer to *Lizzi*. The Tenth Circuit was either not aware of the decision below and its well-reasoned explanation of why a plaintiff should not be allowed to evade sovereign immunity by suing individual supervisors, rather than the employer, or did not consider the situations to be comparable, which is hardly the basis for a true conflict of Circuits. The instant case best effectuates the real party in interest analysis reflected in this Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984), which states:

> When the suit is brought only against state officials, a question arises as to whether that suit

> is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." . . . Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." . . . And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. (Citations and footnote omitted.)

Pennhurst, 465 U.S. at 101 n.11 further states that

> [t]he general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."

(Citing to *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). *See also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the governmental entity itself"); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"). Under the foregoing precedent, the immunity of WMATA shelters the individual Defendants as well where, as the Court of Appeals properly

recognized, WMATA is the real party in interest. Moreover, the decision below is consistent with precedent establishing that supervisors cannot be held liable under other federal statutes such as Title VII and the ADEA. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994).

Even if this Court deems the decision below to be inconsistent with *Cornforth*, additional reasons dictate that review by this Court is not appropriate at this time. Although decisions of the Fifth (*Kazmier*) and Eleventh (*Wascura*) Circuits support the Fourth Circuit's decision below, other Circuits have yet to decide this issue. Even more importantly, the whole issue may well be moot, as neither *Cornforth* nor the decision below, nor any other Circuit, has interpreted the statutory language of the FMLA as to whether a governmental official may even be sued under the language of the statute itself. In *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 776 (M.D.N.C. 2000), the court found that the placement of the words "includes any 'public agency' " in 29 U.S.C. § 2611(4)(A)(iii) "strongly suggests that Congress intended subsection 4(A)(ii) to create individual liability for persons acting on behalf of private employers described in subsection (4)(A)(i), but not for persons acting on behalf of public employers defined by subsections (4)(A)(iii) and (iv)." The rationale of *Keene*, if ultimately adopted by the appellate courts, would render unnecessary any need for this Court to rule on the immunity analysis. Clearly, this Court does not want to waste time deciding what may become a moot issue, nor does it want to address the statutory interpretation issue without the benefit of any analysis by the Circuit Courts of Appeals. Consequently, *Keene* presents an additional, compelling reason why review by the Court should not be granted in the instant case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 01-647

In The Supreme Court of the United States

CHRISTOPHER T. LIZZI,

Petitioner,

v.

WMATA, ROBERT ALEXANDER, CHARLES THOMAS, PHILLIP WALLACE, AL McCOY, ANTHONY JOHNSON DENISE KURTZ (as personal representative of the estate of Michael Kurtz), and JACK BYRD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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United States Constitution, Compact Clause of Article I, Section 10

> No State shall, without the Consent of Congress, enter into any Agreement or Compact with another State....

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Sections 1 and 5

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WMATA Compact, Section 12(a)
Md. Cts. & Jud. Proc. Code Ann. § 10-204(12(a))

In addition to the powers and duties elsewhere described in this title, and except as limited in this title, the Authority may:
(a) sue and be sued....

WMATA Compact, Section 80
Md. Cts. & Jud. Proc. Code Ann. § 10-204(80)

The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the zone of any immunity from suit.

WMATA Compact, Section 81
Md. Cts. & Jud. Proc. Code Ann. § 10-204(81)

The United States District Courts shall have original jurisdiction, concurrent with the courts of Maryland, Virginia and the District of Columbia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State or District of Columbia court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

REASONS FOR GRANTING THE WRIT

I. By Holding That The WMATA Interstate Compact, Which Says That WMATA May "Sue And Be Sued" And That United States District Courts Shall Have Jurisdiction Over Suits Against WMATA, Does Not Waive Eleventh Amendment Immunity, The Fourth Circuit Contradicted This Court's Holdings, In Port Authority Trans-Hudson Corp. v. Feeney And Petty v. Tennessee-Missouri Bridge Comm., That Such Consent-To-Suit And Federal-Court-Venue Provisions Waive The Eleventh Amendment Immunity Of Interstate-Compact Entities.

Would Congress have approved the WMATA Compact if it had known that WMATA would – in the face of Compact provisions stating that federal courts have jurisdiction over suits against WMATA - assert that it can't be sued in federal court for violating federal law?

Never - especially given that in 1959, several years prior to Congressional approval of the Compact, this Court held, in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), that provisions analogous to §§ 12(a) and 81 of the Compact are a waiver of Eleventh Amendment immunity.

And contrary to WMATA's suggestion, Hess v. Port-Authority Trans-Hudson Corp., 513 U.S. 30 (1994), did not even address – much less resolve – whether provisions like §§ 12 and 81 effect such a waiver. Rather, Hess addressed the situations in which a suit against an interstate entity

should be considered, for Eleventh Amendment purposes, a suit against the States creating it. Indeed, the Hess Court expressly noted that it was addressing only this latter issue, in contrast to its earlier decision in Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), which addressed whether PATH – the same interstate entity that was at issue in Hess - had effectively waived Eleventh Amendment immunity. See Hess, 513 U.S. at 38-39.

Likewise, the portion of Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986), cited in Hess addressed only whether a suit against WMATA is effectively a suit against the States creating it. Morris, 781 F.2d at 225-27.

It's true that a footnote in Morris touched on the waiver issue. 781 F.2d at 222 n. 3. But that footnote reveals both that the plaintiff there wasn't even asserting waiver and that the Morris court didn't consider Petty, which guided this Court's discussion of waiver in Feeney.

Its distracting references to Hess and Morris aside, WMATA nowhere challenges petitioner's argument that § 80 of the WMATA Compact - which refers merely to claims arising under the laws of the signatories to the Compact – applies only to state-law claims, and conversely musters no defense of the Fourth Circuit's conclusion that § 80 delineates the full scope of WMATA's consent to be sued.

WMATA also makes no effort either to square the Fourth Circuit's holding with this Court's holdings in Feeney and Petty or to reconcile the holding below with Justice Scalia's observation in College Savings Bk. v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 U.S. 666 (1999), that cases – such as Petty - involving interstate-compact

agencies present an immunity analysis that is "fundamentally different" than that applicable to purely-state agencies. Id. at 686-87.

Review of this case is important for purposes of not only correcting the Fourth Circuit's departure from Feeney and Petty, but also clarifying the principles relating to waiver of Eleventh Amendment immunity. In this regard, this Court is currently considering several cases involving waiver issues – albeit waiver issues that differ in varying degrees from that presented here. (Those cases include Mathias v. WorldCom Tech, Inc. (No. 00-878), in which the Solicitor General's Brief relies on Petty.) Consideration of this case along with those cases will enable this Court to efficiently – and more comprehensively - clarify the waiver spectrum.

II. The Fourth Circuit's Holding That The FMLA Doesn't Abrogate Eleventh Amendment Immunity Conflicts With This Court's Federalism Decisions.

On December 11, 2001, the Ninth Circuit, in Hibbs v. HDM Dept. of Human Resources, 2001 U.S. App. LEXIS 26364 (9th Cir. 2001), held that the FMLA abrogates Eleventh Amendment immunity insofar as it provides for family leave.

The Ninth Circuit's decision conflicts directly with the Fourth Circuit's holding below. The Fourth Circuit – without distinguishing between the FMLA's personal-leave and family-leave provisions - held that the FMLA does not abrogate Eleventh Amendment immunity. It employed a line of reasoning which nullified the FMLA in its entirety as to the States. For instance, the Fourth Circuit stated that while

an ostensible purpose of the FMLA is to minimize gender discrimination by providing for medical leave and family leave, Congress failed to identify any pattern of state-sponsored discrimination relative to providing "family or medical care." App. (to Petition for Certiorari) 13a. Further targeting the FMLA's personal and family-leave provisions together, the Fourth Circuit asserted that "instead of attempting to remedy the identified [Constitutional] violation, Congress attempted to redefine the right," and that "[t]he Fourteenth Amendment does not allow Congress to prescribe a privately enforceable guarantee to all state employees of at least twelve weeks of leave per year." App. 13a-14a. Finally, it concluded, without qualification, that "[t]he FMLA does not validly abrogate a state's Eleventh Amendment immunity from suit." App. 14a.

While the Hibbs Court stated in dicta that the FMLA's family-leave provision "can more plausibly [than the person-leave provision] be defended as an attempt to remedy gender discrimination," 2001 U.S. App. LEXIS 26364, at *8 n.3, that assertion is suspect for several reasons. First, as explained by Judge Dennis of the Fifth Circuit, any abrogation analysis that examines that FMLA's personal and family-leave provisions separately ignores the fact that Congress intended them to work interdependently to combat gender discrimination and is analogous to "the proverbial blind men examining an elephant's parts." Kazmier, 225 F.3d at 544 (Dennis, J., dissenting).

Second, as demonstrated by Judge Cook in his dissent in Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 121 S.Ct. 968 (2001), the personal-leave provision is indeed an integral part of the weaponry which Congress installed in the FMLA

to combat gender discrimination. 193 F.3d at 1228-31. With particular reference to the personal-leave provision, Judge Cook stated that "by authorizing leave for all serious health conditions rather than only for pregnancy related disabilities, the FMLA discourages discrimination against women of childbearing age." Id. at 1230-31. In support, he cited a 1991 Senate Report which states as follows regarding the bill containing the FMLA: "Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women by legislation which provides job protection only for pregnancy related disability." 193 F.3d at 1231 n. 16 (quoting S. Rep. No. 102-68, at 35 (1991).

Resisting review, WMATA simply insists that the circuits to date have uniformly held that the FMLA doesn't abrogate Eleventh Amendment immunity. Hibbs introduces conflict on that issue, however. Moreover, the circuits to which WMATA refers have based their conclusion on this Court's holdings in cases such as Garrett and Kimel. In so doing, they have wrongly – and seemingly reflexively – treated the FMLA as just another domino ready to fall alongside the statutes involved in those cases. Petition for Certiorari at 13-19.

Given that there is a substantial question as to whether the FMLA abrogates Eleventh Amendment immunity, and that inter-circuit conflict exists on this issue, this Court should grant review.

III. The Fourth Circuit's Holding That The Eleventh Amendment Shields State Officers From FMLA Liability Not Only Conflicts

With A Tenth Circuit Holding That Imposes Individual-Capacity Liability On Government Officials For FMLA Violations And The Holdings Of Various Circuits That The Eleventh Amendment Does Not Immunize State Officers From Individual-Capacity Liability, But Also Contradicts This Court's Holding In Hafer v. Melo.

Two months ago, Judge Gibson of the Eighth Circuit expressly noted the conflict between the holdings of the Fourth Circuit in this case and the Tenth Circuit in Cornforth v. University of Okla. Bd. of Regents, 263 F.3d 1129 (10th Cir. 2001). See United States ex rel. Gaudineer & Cornito, L.L.P. v. Iowa Dept. of Human Serv., 269 F.3d 932, __, 2001 U.S. App. LEXIS 26839, at *19-20 (8th Cir. 2001)(Gibson, J., dissenting). Judge Gibson's observation supports petitioner's position that Cornforth most certainly rejects the Fourth Circuit's reasoning here, as well as the reasoning of the Fifth and Eleventh Circuits in Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000), and Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999), respectively.

In opposing review, WMATA cites various decisions which address official-capacity claims against state officers. WMATA Opposition at 9-11. But those cases are obviously irrelevant to the individual-capacity issue presented here.

WMATA also states that this Court should abstain because only the Fourth, Fifth, Tenth, and Eleventh Circuits have addressed the issue presented. WMATA Opposition at 11. Yet this Court need not – and should not – condition its review on further circuit disarray, especially when the

decisions on one side of the conflict stray far from this Court's precedent.

Finally, WMATA says that the issue presented here may become moot, because no circuit has determined whether the FMLA's language imposes liability on individuals. Aside from disregarding the status of this case, this statement ignores reality. As recently noted in Morrow v. Putnam, 142 F. Supp.2d 1271, 2001 U.S. Dist. LEXIS 15280, at *10 (D. Nev. 2001), "[m]ost circuit courts have held that the FLSA extends liability to supervisory personnel" and "[t]he majority of courts have applied this precedent from the FLSA to find that supervisors may be sued in their individual capacity under the FMLA." Further, the Fourth Circuit's reasoning, if correct, applies outside the FMLA context. In fact, the Fourth Circuit recently described its holding below as "our holding in Lizzi that if a statute treats an individual state employee as the employer, the real party in interest is in reality the state itself" and simultaneously stated that the Seventh Circuit – in an FLSA case – has agreed with this holding. Montgomery v. Maryland, 266 F.3d 334, 340 (4th Cir. 2001). The Fourth Circuit has thus clarified that its holding applies not only to the FMLA, but also to the FLSA and all other statutes that treat an individual state employee as an employer. And based on the Fourth Circuit's view, a district court has held that state officers cannot be held personally liable for FLSA violations. Baird v. Kessler, 2001 U.S. Dist. LEXIS 19106, at *20 (E.D. Cal. 2001). Also, prior to this case, the Ninth Circuit similarly held that the Eleventh Amendment bars FLSA claims against state officers in their individual capacity. Hale v. Arizona, 993 F.3d 1387, 1399 (9th Cir. 1993).

In summary, the principle that state officers can be held liable in their individual capacity is an important component of the coherent federalism jurisprudence which this Court has delineated in recent years. The Fourth Circuit's holding conflicts with that principle and creates inter-circuit conflict concerning it. Unless the conflict is resolved, this Court's efforts to clarify and maintain the federalism envisioned by the Framers will remain unfinished, and federalism jurisprudence will remain unnecessarily confusing.

IV. In Hafer v. Melo, This Court Recognized, But Did Not Resolve, An Inter-Circuit Conflict Concerning The Proper Method For Determining, In Instances Where The Complaint Does Not Specify, Whether State Officers Have Been Sued In Their Individual Or Official Capacity. The Fourth Circuit, By Reviewing Only The Complaint - Rather Than The "Course Of Proceedings" - To Determine Whether Government Officials Were Sued In Their Individual Or Official Capacity, Adopted An Approach That, While Consistent With The Method Employed By The Sixth And Eighth Circuits, Conflicts With The "Course-Of-Proceedings" Approach Used By Not Only The Second, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, And District of Columbia Circuits, But Also The Fourth Circuit Itself In Prior Cases.

On November 8, 2001, the Sixth Circuit, sitting en banc in Moore v. City of Harriman, 272 F.3d 769, 2001 U.S.

App. LEXIS 24056, (6th Cir. 2001), again exposed the inter-circuit conflict on this issue. The Moore dissent expressly noted that this Court has recognized, but not resolved, this conflict. 2001 U.S. App. LEXIS 24056, at *21 n. 4.

Moreover, the majority and minority opinions in Moore exemplify the conflict. The majority recognized that other courts have interpreted Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989), to require plaintiffs to plead "individual capacity" in the complaint, but held that the Sixth Circuit actually has applied a "course-of-proceedings" test to determine the capacity in which state officers have been sued. 2001 U.S. App. LEXIS 24056 at *6-7. But the Moore dissent vehemently argued, first, that, in Wells, the Sixth Circuit adopted the contrary approach adopted by the Eighth Circuit in Nix v. Norman, 879 F.2d 429 (8th Cir. 1989), and, second, that this latter – and more stringent – approach "gives effect to important jurisdictional and jurisprudential concerns." 2001 U.S. App. LEXIS 24056 at *67.

Moore confirms the need for this Court's resolution of this issue. The substantive issues presented by actions against state officers are difficult enough. There is no need for this procedural morass – which can be resolved with relatively straightforward guidance from this Court - to complicate matters further.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, this Court should summarily reverse the holdings of the Fourth Circuit addressed herein.

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